Supreme Court, U.S.
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No. 01-1275

In the Supreme Court of the United States

CHARLIE HARRIS, ET AL.,
Petitioners,

v.

AKRON DEPARTMENT OF PUBLIC HEALTH, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals depart from the accepted and usual course of judicial proceedings in striking affidavits from the petitioners' brief as new evidence when the same affidavits were used repeatedly in motions in the lower district court and then make the statement that the petitioners lacked that same evidence?

2. Did the United States Court of Appeals sanction departure from the accepted and usual course of judicial proceedings by the lower district court granting summary judgment after almost five (5) years of proceedings, no oral argument, and no bona fide trial?

3. Did the United States Court of Appeals enter a decision that is in conflict with the decision of the Court of Appeals of the Ninth Appellate District that mandatory inspections, twice a year for four years of every rental unit an owner owns when he had been convicted of failing to register, is unconstitutional and violates due process? Also, is the Housing Appeals board a remedy when there is a constitutional question?

4. Did the United States Court of Appeals depart from accepted judicial proceedings in stating that the petitioners were unreasonable to be convinced that a judge can be biased?

5. Did the United States Court of Appeals depart from the accepted and usual judicial proceedings when it did not recognize the defendants' failure to comply with discovery or the district courts' failure to note any of the affidavits presented in the petitioners' behalf?

6. Did the United States Court of Appeals depart from usual judicial proceedings in their failure to recognize that the respondents provided no evidence to prove an emergency to health, safety and welfare of its citizens, and a threat to new development?

7. Did the United States Court of Appeals sanction the departure of the usual and accepted judicial proceedings in the district court when it held the plaintiff accountable for a bogus invisible tape?

8. Were the pro se litigants given less stringency than attorneys in The United States Court of Appeals and the district court or were they given due respect?

Questions 1, 2, 4, 5, 7 and 8 concern purely factual or procedural issues that either were fully and properly addressed by the United States District Court for the Northern District of Ohio and the Sixth Circuit Court of Appeals or are clearly inappropriate for consideration by this Court. Further, the Petitioners fail to address why this Court should exercise jurisdiction over these issues. As such, these questions do not merit further response from Respondents or consideration by this Court.

The Petitioners do touch upon components of questions three and six in their Petition. Therefore, Respondents submit this Response to address the same, and to clarify the facts.

LIST OF PARTIES

Petitioners: Charlie Harris
Jacqueline Harris
John H. Harris

Respondents: Akron Department of Public Health
Akron City Council
John Valle, President of Council
C. William Keck, Director of Health
Robert Remmel
Jodie Forester
Jon Apati
Michele Williams
Laura Smart
Kevin Ragle
Steven Nome
Dwayne Groegor
John Doe
Unknown Akron Health Department Inspectors/Sanitarians

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JURISDICTION

The Sixth Circuit Court of Appeals issued a decision in this case on May 8, 2001. On July 25, 2001, the Sixth Circuit Court issued an Order denying the Petitioners' request for an *en banc* rehearing. Then, three days before their Petition was due, on October 20, 2001, the Petitioners filed for an extension of time (60 days) within which to file their Petition, and Petitioners were given until December 22, 2001 to file their Petition. On January 3, 2002, the Court, via a letter from the Clerk, informed the Petitioners that the original Petition for Writ of Certiorari was being returned because it failed to comply with the rules of this Court. The Clerk enumerated twelve distinct errors with the Petition. They were, in brief, size of paper, booklet format, type of binding, cover, typeset, prohibition of photocopying, margins, text on both sides of paper, order of the documents, page numbering, page limit and proof of service. The Clerk then requested that Petitioner correct the Petition accordingly.

The "corrected" Petition was then filed with the Court sixty days later, with all technical corrections satisfied. However, discounting the form changes, the substance of the corrected document bears little resemblance to the original document submitted to the Court. In the original Petition the statement of the case occupied two pages. In the current Petition, the statement of the case occupies seven pages. Although there are some general similarities from the first document present in the resubmission, the facts and arguments submitted have been altered drastically.

The changes made by Petitioners are changes in substance, not form, and are not permitted by the rules of this Court. Rule 14.5, Rules of the Supreme Court of the United States states:

> If the clerk determines that a Petition is submitted timely and in good faith is in a *form* that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected Petition received no more than 60 days after the date of the Clerk's letter will be deemed timely. (Emphasis added.)

The twelve items enumerated in the Clerk's letter to the Petitioners required only changes in form. Accordingly, the Petitioners were only permitted to make the changes solicited by the Clerk. Petitioners ought not be allowed to alter the substance of the Petition during the grace period granted by Rule 14.5.

The Court, with good reason, has very specific technical filing requirements. The discretionary extension allowed by Rule 14.5 is an extremely important safety valve for those Petitioners who merely make "form" errors. It should not, however, be construed in any way to allow substantive changes of an argument or case presented to this Court. Accordingly, the Petitioners have failed to timely file their Petition and this Court does not have jurisdiction to consider the substance of the current Petition.

STATEMENT OF THE CASE AND FACTS

The "facts" recited in the Petition bear little resemblance to the record below; accordingly, Respondents object to the facts as recited by the Petitioners and provide this Court with the following statement of the case and facts.

The District Court and Sixth Circuit Court of Appeals accurately set forth the pertinent facts related to this case,

which are herein summarized. {*See*, Pet'r App. pp. App.3-App.5, App.12-App.16.} Although the legal issues of this case are relatively simple, the history of this case is long and convoluted. Briefly stated, this case involves federal and state constitutional challenges to a municipal housing ordinance.

In October of 1996, the City of Akron, through Akron City Council, passed Ordinance No. 769, which amended Chapter 150 of the Code of Ordinances, as a proactive emergency measure necessary to preserve public safety, health, and welfare of the citizens of Akron. {App. 33- App. 83} Ordinance 769 mandates registration of all non-owner occupied properties, and authorizes the City Housing Inspector to inspect these properties only upon consent of the owner or occupant, or as otherwise "authorized by law." {Sec. 150.02, App. 39} Ordinance 769 further provides a method of notifying an owner of a violation, and requires that the owner be granted a reasonable time to comply. {Sec. 150.03, App. 40} If an owner disagrees with any Health and Housing Order issued, Section 150.05 of the Health and Housing Code provides an owner with an extensive appeals process prior to any enforcement action. {App. 45} If an owner receives two convictions for violations of the Health and Housing Code, Section 150.40 of the Code requires the owner to submit to biannual inspections of the owner's properties for four years. {App. 76}

In this case, Petitioners own rental units governed by Ordinance 769. In 1996, twelve Plaintiffs filed four *pro se* lawsuits against the City of Akron, Akron City Council, the Akron Department of Health, and various City of Akron employees, (collectively the "City"), alleging violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and other state constitutional and tort causes of action.{App. 11, App. 15} Due to the

complexity of the Complaints, the relationship of the twelve Plaintiffs, and the similar nature of the cases, the District Court Judge consolidated the cases and instructed the Plaintiffs to obtain counsel. Although Plaintiffs had already once amended their Complaints, counsel then filed a Second Amended Complaint alleging, under 42 U.S.C. Sec. 1983, that Ordinance 769 violated only the Fourteenth Amendment, and the case moved forward towards trial. Then, Plaintiffs' counsel moved to withdraw from the case after one of the Plaintiffs, herein Petitioner John Harris, led counsel to believe that he surreptitiously audiotaped a status conference with the Judge. After a hearing on the matter, wherein the Judge agreed that said Plaintiff had indeed led counsel to believe such a tape existed, counsel was permitted to withdraw. All Plaintiffs retained new counsel, except Charlie and Jacqueline Harris, who were reluctantly permitted to proceed *pro se*.

It is at this point that an already complex case became, as the District Court stated, "a procedural nightmare for two federal judges."{App. 15} Particularly, Charlie and Jacqueline Harris made several requests to file a Third Amended Complaint, which requests were denied. Because the Harris' were not permitted to again amend their Complaint, they simply filed virtually identical claims in Summit County Court of Common Pleas. The Defendants removed these cases to Federal District Court, and the cases were consolidated herein. The District Court Judge found that these "new" cases were filed to circumvent his denial of the Harris' repeated requests to amend their already twice Amended Complaint.

Throughout this bizarre case history, the Harris' had consistently and intentionally failed to respond to basic discovery requests in the face of numerous motions to compel, culminating in the granting of a Fed. R. Civ. P.

37(c)(1) motion, excluding from the Court's consideration any additional evidence by any party.

In October 1999, the City filed a Motion to Dismiss, or, in the alternative, a Motion for Summary Judgment. One Plaintiff (Borom) filed a Motion for Summary Judgment arguing only the Fourth Amendment issue. Petitioners Charlie and Jacqueline Harris filed a Memorandum in Opposition to the Defendants' Motion for Summary Judgment, arguing only that the Ordinance violates the Fifth, Seventh, and Eighth Amendments and further claimed mental distress. The City filed another Motion for Summary Judgment addressing Petitioners' Charlie and Jacqueline Harris' claims of mental distress. None of the other Plaintiffs, including current Petitioner John Harris, filed any motions, nor responded to either of the City's Motions.

On March 22, 2000, the District Court granted Summary Judgment in favor of all Defendants on all claims. In its decision, the District Court stated:

> "[t]he only constitutional claim properly before the Court at this time is the Fourteenth Amendment claim. However, through an abundance of caution or confusion over what claims are in this case, the defendants filed a summary judgment motion addressing numerous constitutional issues . . . the court will address the Fourteenth Amendment claim, the Fourth Amendment claim and the mental distress claim . . . Charlie and Jacqueline Harris's Fifth, Seventh and Eighth Amendment allegations, which are echoed in the removed cases, are not properly before the Court. Even if they were, they would be

> dismissed as a matter of law because there is no legal basis for such allegations."

{App. 16} The Court then proceeded to fully discuss each constitutional claim, and, ultimately, granted summary judgment to the City.

Upon review, the United States Court of Appeals for the Sixth Circuit affirmed the grant of summary judgment on all issues, also finding that there was no merit to any of the Petitioners' claims. {App. 6} Additionally, the Court of Appeals ruled against the Petitioners on the issues of abuse of discretion by the trial judge in excluding evidence and found no basis to support a claim of bias by the District Court Judge. {App. 8}

REASONS FOR DENYING THE PETITION

I. Petitioners have not articulated any compelling reason to justify discretionary review by this Court.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup.Ct.R.10. Rule 10 of the Rules of the Supreme Court of the United States further provides that "a writ of certiorari will be granted only for compelling reasons." In this case, Petitioners do not set forth any compelling reasons to invoke this Court's jurisdiction.

A. There is no conflict of decisions between a state court of last resort and the Sixth Circuit Court of Appeals.

Rule 10(b) of the Rules of the Supreme Court of the United States provides that this Court may grant a Petition if

a state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals.

The Petitioners erroneously contend that the Sixth Circuit Court of Appeals' decision upholding the constitutionality of Ordinance 769 is in conflict with a decision of the Court of Appeals for the Ninth Appellate District of the State of Ohio, and, as such, this issue warrants consideration by this Court. First, an opinion of a state appellate court does not represent a ruling by a state court of last resort. Ohio Const. Art. IV, Sec. 2(B)(2)(ii). Additionally, the Ohio Appellate Court opinion referenced by Petitioners is not in conflict with the Sixth Circuit Court of Appeals decision herein. Particularly, Ohio's Ninth District Court of Appeals found Ordinance 769 unconstitutional based only on state grounds, and only as applied to the unique facts of that particular case. *See Urban Imperial Building & Rental Corp. v. City of Akron*, 139 Ohio App.3d 221, 225, 743 N.E.2d 478, 481. Finally, the opinion by the Sixth Circuit is unpublished, and as such is only binding on the parties to the litigation. 6th Cir. R. 28(g). Therefore, this case has no precedential value, nor is it considered *stare decisis* as to the issues presented. There is no conflict for this Court to resolve at this time.

B. The District Court and the Sixth Circuit Court of Appeals applied the proper legal standards to the facts.

Rule 10(a) of the Rules of the Supreme Court of the United States provides that this Court may grant a Petition for Writ of Certiorari if "a United States Court of Appeals...has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court,

as to call for an exercise of this Court's supervisory power." Petitioners fail to provide argument, supported by the record, that the Sixth Circuit Court of Appeals departed in any way from the customary course of judicial proceedings. Rather, the District and Appellate Courts applied the proper legal standards to the facts. Accordingly, this Court should not exercise discretionary jurisdiction in order to overturn fact findings adverse to Petitioners.

1. The District Court and Sixth Circuit Court of Appeals did not depart from accepted judicial proceedings when determining that Ordinance 769 does not violate the Fourth Amendment prohibition against unreasonable searches.

Petitioners correctly cite *Camera v. Municipal Court of the City and County of San Francisco,* 387 U.S. 523 (1967), as the standard established by this Court for determining whether an administrative search conducted pursuant to a municipal housing ordinance violates Fourth Amendment protections. The Sixth Circuit Court of Appeals applied the standard enunciated in *Camera* to Ordinance 769 and found that the Ordinance does not offend Fourth Amendment protections. {App. 6-App.7} Said Court found that Ordinance 769 specifically provides that if entry is refused, an inspection may only be conducted as provided by law, either with a warrant or pursuant to a proper exception to the warrant requirement. {App. 39} In their various motions to the District Court, Petitioners presented only unsupported legal conclusions of unconstitutionality. The District Court properly found that Plaintiffs presented no

evidence to support such a claim of unconstitutionality, and the Sixth Circuit Court of Appeals affirmed. {App.25, App.6}

Therefore, because the correct legal standard was applied, this Court could only reach a different conclusion through a different interpretation and analysis of the facts. In an attempt to sway this Court to accept their Petition, Petitioners attempt to introduce "new" facts at this juncture. This Court, however, should not accept jurisdiction for the purpose of correcting perceived errors in the factual findings when the proper stated rule of law was applied by the Courts below. Sup. Ct. R. 10. Thus, there is no compelling reason for this Court's review.

2. The District Court and Sixth Circuit Court of Appeals did not depart from accepted judicial proceedings when determining that Ordinance 769 does not violate either procedural or substantive due process.

The Akron Health and Housing Code, and specifically Ordinance 769, comport with the constitutionally mandated due process standards regarding notice and an opportunity to be heard. As the District Court found, Akron's Health and Housing Code provides "a plethora of administrative procedures" to challenge the issuance of a Housing Code Order. {App. 22} These administrative procedures include adequate notice to owner of a violation, a reasonable time for the owner to comply with the code requirements, and an administrative right of appeal to the Housing Appeals Board and state courts. {Code 150.05, App. 45-App.47} Once again, at both the District Court and Sixth Circuit Court of

Appeals, Petitioners failed to provide any evidence to support their vague claims of inherent unfairness and insufficient procedures. Accordingly, the District Court properly granted summary judgment on these issues, and the Sixth Circuit Court of Appeals affirmed. {App.22-App.25, App.7-App.8}

The Akron Health and Housing Code and Ordinance 769 do not violate the constitutionally mandated standard of substantive due process. The District Court applied the legal standard as announced in *Mansfield Apartment Owners Ass'n v. City of Mansfield,* 988 F.2d 1469, 1477 (6th Cir. 1993), *citing, Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955), noting that "an ordinance violates substantive due process if it fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate governmental interest" or if the Defendants' conduct in passing Ordinance 769 "shocks the conscience." The District Court specifically found "that the Ordinance does not shock the conscience because the Ordinance is a legitimate use of legislative authority and it is rationally related to a valid governmental interest." {App. 23} The Sixth Circuit also applied the *Mansfield* rule of law and held that there was ample evidence in the preamble to the Ordinance to support public necessity. {App. 7}

Thus, because the District Court and Sixth Circuit Court of Appeals applied the proper legal standard, this Court could only find a departure from "the accepted and usual course of judicial proceedings," if this Court re-evaluating the facts of this case. Accordingly, Rule 10(a) does not apply and this Court should deny certiorari.

C. The District Court and the Sixth Circuit Court of Appeals relied upon well-settled federal law.

Rule 10(c) of the Rules of the Supreme Court of the United States provides that this Court may grant a Petition if a United States Court of Appeals has decided an important question of federal law that has not been settled by this Court.

Petitioners assert that the decision in this case is worthy of review because somehow it has changed a municipality's ability to regulate rental properties, and, as such, it will affect rental owners nationwide. The municipal governmental interest in regulating and inspecting rental properties is well established by this Court. *See Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *Camera v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 537-39 (1967); *and, Mansfield Apartment Owners Ass'n v. City of Mansfield,* 988 F.2d 1469, 1477 (6th Cir. 1993), *citing, Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955). Both the District Court and the Sixth Circuit Court of Appeals relied upon the law set forth in these cases when deciding that Ordinance 769 passed constitutional muster. {App. 6, 7, 19, 23} The Petitioners have not, and cannot, cite a single instance in which the lower courts have altered federal law.

Because "the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law," this Court, in accordance with Rule 10, should not exercise discretionary jurisdiction over the Petition for Writ of Certiorari herein.

CONCLUSION

Based upon the forgoing, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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